While the authority and responsibilities of an owner "pro hac vice" may differ from those of an operating agent in some respects, nevertheless, for most practical purposes, and particularly with respect to liabilities to seamen, they are essentially the same. In the *Hust* case, the majority held the General Agent liable as an operator. The concurring opinion pointed out that the General Agent had such a substantial measure of control over the management and possession of the vessel as to render the agent an owner "pro hac vice". While the liability of the General Agent here is the same whether he be an operator or an owner "pro hac vice", nevertheless, the additional evidence in this record clearly sustains the view that the status of the agent is tantamount to that of an owner "pro hac vice".

It is appropriate here to consider the record in determining who has possession of the vessel, and also who exercises the management over the vessel.

SECOND POINT

Under the General Agency Agreement the vessel is physically delivered to the General Agent who retains custody during the entire period of the Agreement.

The Government has argued most vehemently that possession of the vessel was never vested in the General Agent, but on the contrary, it always remained with the Government. This contention is flatly contradicted at the very outset by the express provisions of the General Agency Agreement itself, in addition to other documentary and conclusive evidence.

Article I of the Agreement provides:

"Article 1. The United States appoints the General Agent as its agent and not as an independent contractor,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 430

ISAAC GAYNOR,

Petitioner

vs.

AGWILINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF PETITIONER

ABRAHAM E. FREEDMAN,
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1015 Chestnut Street,
Philadelphia 7, Pennsylvania,
Counsel for Petitioner.

to manage and conduct the business of vessels *assigned to it* by the United States from time to time."

The use of the term "assigned" implies a transfer of the vessels for the enumerated purposes, i.e., to "manage and conduct the business of the vessels". This interpretation is supported by the next article of the Agreement, which requires the General Agent to "*accept*" the vessels which are "assigned" to it, as follows:

> "The General Agent *accepts* the appointment and undertakes and promises so to manage and conduct the business . . . of such vessels as have been or may be by the United States assigned to and *accepted by* the General Agent."

The plain purport of these clauses means a delivery of the vessels by the United States and an acceptance of possession by the General Agent. This construction is most clearly substantiated by the provisions in the Agreement relating to termination. Article 11(a) provides:

> "Article 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent *and to assume control* forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice."

This is a significant provision. If, as the Government contends and the Court of Appeals below found, the possession and control of the vessels was always in the United States, why should it be necessary to provide for the Government "to assume control" of something already in its control? The necessary inference is that the "control" passed to the General Agent and remained with the latter until the Agreement was terminated. In this connection, it is to be noted that the General Agent cannot terminate

the Agreement as to any vessel until her arrival and discharge at a continental United States port (Art. 11(b)). The inference from this provision is that the Agent was not to be permitted to divest itself of the operating responsibilities while the vessel was at sea or in a foreign port. The next provision in the Agreement expressly refutes any suggestion that the possession does not pass to the General Agent, as follows:

> "Article 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, *all vessels* and other property of whatsoever kind *then in the custody of the General Agent* pursuant to this Agreement, *shall be immediately turned over to the United States*, at times and places to be fixed by the United States . . ."

Here is express recognition that the vessel was intended to be in the "custody" or possession of the General Agent. There is no need for speculation to determine what the parties had in mind. The language used leaves no room for different inferences. The Agreement, considered as a whole, clearly shows that the vessel was to be "assigned" with "control" and "custody" to the General Agent. The conclusion is inescapable that the Agreemnt contemplated a transfer of possession to the General Agent for the life of the contract.

Notwithstanding the plain language of the Agreement, the Government and the vessel operators, after the decision in the *Hust* case, re-opened the question in the *Caldarola* case, and there, upon a meager and inadequate record, urged a construction upon the Court which was grounded upon considerations dehors the record. It was there contended that the General Agent under the Agreement had no more control or possession of the vessel than a "plumber" had

over premises where he was engaged to make a repair. The respondent and the Government urged that there was only one issue in the case and posed it in the following terms: "This case depends on control i. e. physical possession of the vessel." Significantly enough, the respondent and the Government carefully avoided the issues raised by the majority opinion in the *Hust* case, but singled out the concurring opinion of Mr. Justice Douglas for an extraordinary attack. Because the argument which was advanced in that case is the basis for the decision of the Court of Appeals in the instant case, it is highly important to carefully analyze it.

Respondent concentrated its most vigorous attack upon the point that the General Agent did not receive possession of the vessel, and in this connection, undertook to point out how Justice Douglas had "erred" in so construing the Agreement as to imply a "delivery" of the vessel to the General Agent. Respondent's brief (p. 25) states:

> "Mr. Justice Douglas, evidently, took the phrase 'assigned to and accepted by the General Agent' as meaning '*delivered to* and accepted by the General Agent.'"

The Government then takes an unequivocal position and stands on the point that since the parties had not used the word "delivered", they could not have contemplated that physical possession should pass to the agent, as follows:

> "But, the parties to the contract did not use the word 'delivered'. *If they had contemplated that physical control would pass to the General Agent, 'deliver' would have been the natural word for them to use.* Their use of the word 'assigned' negatives the existence of an intent that physical possession of the vessels should be delivered." (Emphasis supplied.)

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Subject Index

The rationale of the respondent's argument is that the parties could not have meant the vessels to be delivered only because they did not use the magic word. We submit that the Agreement cannot be so construed, for, as we have stated, the reasonable interpretation to be applied to the word "assigned" is that the vessel was to be transferred, and it contemplated even more than a mere delivery. This interpretation is clearly supported by the other provisions of the Agreement which placed the "control" and "custody" in the General Agent. Aside of these facts, however, there is in this record conclusive documentary evidence (which was lacking in the *Caldarola* case) showing that the vessel was actually and physically "delivered" to the General Agent as required by the Agreement. The evidence is in the form of a "Delivery Certificate" rendered at the inception of the Agreement and a "Redelivery Certificate" rendered at the termination of the Agreement. Because these documents use the very word "delivered", which the Government previously maintained was not used, and thereby take the very foundation from under the Government's argument, it is appropriate to set these certificates out in full (R. 21):

"Delivery Certificate

War Shipping Administration

December 31, 1942.

This Is to Certify That the S/S Christopher Gadsden owned by the United States of America, represented by the War Shipping Administration, was on the 31st day of December, 1942, at 7:00 P. M., E. W. T., *delivered* at the port of Wilmington, North Carolina *by War Shipping Administration to Agwilines, Inc.* Under Terms and Conditions of 'Service Agreement, Form GAA' said agreement having been executed March 8,

1942 having on board fuel, stores and equipment as per inventories taken on date of delivery.

WAR SHIPPING ADMINISTRATION
By (Sgd.) A. E. ROENTGEN
Supply Officer

Approved:

(Sgd.) G. F. BLAIR
District Manager
War Shipping Administration
Port of Norfolk, Virginia

AGWILINES, INC.
By SOUTHEASTERN SHIPPING SERVICE
By (Sgd.) ROGER STURGES RILEY"

When the Agreement was terminated, the General Agent re-delivered the vessel and received a receipt as follows (App. 22(a)):

"Redelivery Certificate

Receipt for Redelivery of the S. S. 'Christopher Gadsden'

(Official No. 242665)

The War Shipping Administration hereby accepts from Agwilines, Inc. redelivery of the S. S. 'Christopher Gadsden' as at 12:00 Midnight, Central Standard Time, June 18, 1946, at Galveston, Texas under Service Agreement, Form GAA (Contract, WSA-186, dated March 8, 1942) having on board fuel, water, stores and equipment as per inventories taken on the date of redelivery.

WAR SHIPPING ADMINISTRATION
By (Signed) W. G. YUNG
Operations Supervisor

AGWILINES, INC.
By (Signed) M. O. FANO
Assistant to Vice President"

These certificates completely destroy the very fabric of the respondent's theory and place a new aspect upon the

entire controversy. It is now clear that the liability may be imposed not only upon the basis of the majority opinion in the *Hust* case, but also upon the basis of the concurring opinion of Mr. Justice Douglas in that case, since there is now not the slightest question about the fact that possession of the vessel actually passed to the General Agent. It is this element of possession which makes the Agent an owner "*pro hac vice*", and accordingly liable in connection with all the seamen's rights.

Further analysis confirms also that the General Agent exercised a most susbtantial measure of control over the vessel's management.

Under the terms of the General Agency Agreement the General Agent managed and conducted the business of the vessel as in private operation.

The opposition contends that the General Agent plays no part in the management of the vessel and insists that the Agent is a "shoreside" Agent, whose duties are limited to accounting and fiscal affairs of the vessel. This view simply ignores the realities of the situation and is utterly irreconcilable with the Agreement itself, the Operations Regulations, and all other evidence in the case. It is to be assumed that if the Agent was to be a "shoreside" Agent, it would have been so designated as were "Berth Agents", for example. The very fact that the term "General Agent" was used implies in itself an overall authority which is completely borne out by the Agreement. The Agreement specifically imposes upon this General Agent the complete responsibilities for the operations of the vessel, even to the point of picking other agents in those distant ports where the General Agent has no facilities of his own. It is the General Agent who "hires and fires" the shipmaster and who instructs him with respect to his various duties, as dis-

closed by the Operations Regulations. In every respect, the General Agent exercises the same management over the vessel as an operator in private enterprise, subject only to nominal supervision of the Government. In this connection, it is clear from the authorities heretofore cited that the responsibilities of an operator of the vessel are not diminished in the slightest because the general owner of the vessel has reserved to himself any powers over the vessel's operations, so long as the operator exercises a substantial measure of control over the vessel's management. The fact that the General Agent does exercise such control is immediately evident from the Agreement itself, as well as from all other evidence in the case.

At the very outset, the Agreement, in unambiguous terms, places the management of the vessels in the hands of the General Agent. Article 1 sets forth the general character of the Agent's duties:

> ". . . to *manage* and conduct the business of the vessels assigned to it by the United States."

Article 2 provides for the acceptance and management by the Agent *for* the United States, as follows:

> "The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business *for* the United States."

These provisions clearly demonstrate that it is the General Agent who is to manage the vessels, and that the Government not only relinquished possession, but also the direct control over the management. The argument that the management of the vessels remained with the Government is not only unsupported in fact, but it is simply made absurd by the Agreement.

Article 3A (a) illustrates how deeply the General Agent is concerned with the vessel's management and requires the General Agent to:

> "(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyage, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices; . . ."

This provision independently destroys the respondent's theory, for it requires the General Agent to operate the vessels in all trades and send them into any corner of the world that the Government may direct. In this respect, the Government is in the position of a shipper who "time charters" the vessel and directs the owner or operator where to deliver the cargo. Just as the operator maintains the vessels in the trades designated by the shipper, so the General Agent does with the vessels assigned to him. While the vessels are being maintained in the various trades, it is part of the Agent's functions, in the management of the vessels, to keep them properly equipped, serviced and otherwise maintained, as provided for in (c) of the same Article 3A, as follows:

> "The General Agent shall . . . equip, victual, supply and maintain the vessels."

This provision, like the others, demonstrates the substantial exercise of management by the General Agent over all phases of the vessel's business, during all the while the vessel is in operation, and whether the vessel is on the high seas or in a home or distant port. Only a vessel operator is charged with duties such as these.

The only provision which has been singled out by the Government or the respondent is Article 3A (d) which re-

2. This is a proceeding arising under the general maritime law of the United States, and is within the jurisdiction of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, United States Code, Title 28, Section 347(a) and under Article 3, Section 2 of the Constitution of the United States.

III. Statement of the Case

This is an action by a merchant seaman, injured in the service of his vessel, to recover the costs of maintenance and cure, wages and loss of personal effects. The facts are not in dispute and have been stipulated as follows:

Petitioner signed on the Steamship "Christopher Gadsden" on September 10, 1945 as a utility man for a foreign voyage from Philadelphia, Pennsylvania, to any port or place in the world and return, for a period not exceeding twelve months. The vessel was owned by the United States and operated by the respondent, Agwilines, Inc., under an agreement of general agency.

On December 24, 1945, plaintiff, in the course of the voyage and while the vessel was in the port of Charleston, South Carolina, obtained shore leave to visit some relatives in a nearby town, and while enroute, the bus in which he was riding became involved in an accident which resulted in the plaintiff's injuries.

Claim was made for the cost of his maintenance and cure, wages and his personal effects which were never returned to him. Respondent denied liability for maintenance and cure and wages, but admitted liability for the loss of personal effects.

lates to the manning of the vessel. It is contended that this clause changed the prior practice with respect to employment of the crew, and that, since the master was to be considered an employee of the United States, ergo, the vessel was operated by the United States. Aside of the fact that this reasoning does not contemplate the status and relationship of the General Agent to the vessel, as outlined in the Agreement, it fails to withstand analysis. The particular clause in controversy provides:

> "(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master."

A careful examination of this provision will clearly show that it does not in the slightest degree affect the rights or liabilities of the General Agent.

Note first of all that the employment of the master is under the control of the General Agent. The fact that he is to be considered an employee of the United States is of no consequence so far as the powers and liabilities of the Agent are concerned. In *The "Del Norte"*, *111 Fed. 542*, although the master was appointed by the owner of the vessel, it was held that the charterer was responsible for

The Action of the District Court

The District Judge did not reach the merits of the case, but dismissed the complaint upon the ground that the Clarification Act (Act of March 24, 1943, C. 26, 57 Stat. 45-50 U. S. C. A. App. 1291 *et seq.*) nullified all right of action against the private operator and restricted the seamen's rights to a single remedy against the United States.

The Action of the Court of Appeals

The Court of Appeals reached a contrary conclusion with respect to the application of the Clarification Act, and in this connection, held that the Clarification Act did not bar any suit against the General Agent. However, the Court of Appeals sustained the judgment of the court below upon the entirely different ground that the general agent was not an operator of the vessel, and, therefore, not responsible for maintenance and cure and wages, or for the loss of personal effects. In so holding, the Court held the case of *Hust* v. *Moore-McCormack*, 328 U. S. 707 to be overruled insofar as it had any application with respect to the claim for loss of personal effects which sounded in tort. Insofar as the other two claims were concerned, the Court held that the decision of *Hust* v. *Moore-McCormack* was not controlling.

Questions Involved

The basic issue raised by the decision of the Court of Appeals may be stated as follows:

(a) Where the vessel is owned by the United States and is operated by a private company under an agreement of general agency, does the private operator become liable to an injured seaman for maintenance and cure, wages and loss of personal effects?

the torts of the master because, "having a legal right to control, he is legally presumed to actually control, the master's conduct". As a matter of law, therefore, the Court held that the master is subject to control of the operator, regardless of whether he is employed by the owner or operator. This was also found to be the fact in actual practice under the General Agency Agreements in *Barge Carriers, Inc.* v. *Atlantic and Gulf District of the Seafarers International Union*, Case No. 10-c-1382 (National Labor Relations Board), where it was found as a fact, *inter alia*, that the General Agent "hired and fired" the master in its discretion.

Further evidence that the master acts as Agent for the General Agent in actual fact is significantly manifested in *Read* v. *Agwilines* (Civil Action No. 5603, E. D. Pa.), (the same respondent here involved), where the *master* accepted delivery of the vessel from the Government, *as agent for the General Agent*. He signed the delivery certificate as follows:

> "Agwilines, Inc.,
> By Frank Solis,
> Master, S/S Langdon Cheves."

In actual fact, therefore, it is the General Agent who hires and fires the master and who controls his conduct during the period of his tenure on the vessel, and in point of fact, the Master represents the General Agent in his official capacity. As a matter of law, it is likewise clear that the Master is subject to the control of the General Agent and that the latter is legally responsible for the actions of the Master. The provision of the Agreement under discussion clearly affords no support for the contentions of the respondent or the Government.

The provision that the Master shall exercise full control and responsibility over the navigation and management of

The issue posed by the decision in the District Court is:

> (b) Does the Clarification Act wipe out all of the seamen's traditional rights and remedies and preclude any suit against a private shipping company which operates the vessel under an agreement of general agency with the United States?

IV. Specification of Errors

The Court of Appeals erred in the following respects:

First: In holding that the General Agents, operating the vessels under an agreement of general agency, are not engaged in the management of the vessels' business.

Second: In holding that the duties of the General Agents are limited to shoreside activities while the vessels are in port.

Third: In failing to hold that the General Agents received possession of the vessels and managed and conducted the vessels' business.

Fourth: In failing to follow the express ruling laid down in the *Hust* case, which held the General Agent liable to the seamen for all rights arising out of personal injuries, including damages, maintenance and cure, wages and loss of personal effects.

Fifth: In erroneously construing the decision in the *Caldarola* case and attributing to it a purport and scope not justified by the ruling or the reasoning upon which it was based; and particularly, in holding that it overruled, at least in part, the *Hust* decision.

Sixth: In destroying the uniformity and characteristic features of the maritime law by destroying some rights and making others variable, depending upon which ship the seamen happened to sign on, and by making the liability vary with different defendants.

the vessel affects no change in the prior practice, since the Master, under the law, is required to do precisely that. Because the Merchant Marine is so affected with a public interest, in order to insure the safety of life and property, the law requires every merchant vessel to be manned by licensed and certificated personnel and to be commanded by a licensed Master (46 U.S.C.A. 221 *et seq.*). The navigation and internal management of the vessel is and always has been the exclusive province of the shipmaster, and the law would prohibit any person from interfering with the Master's authority on board the vessel, even though such person be the owner or operator himself. That is not to say that the Master is not subject to the control of the operator, for the latter may remove or replace the Master at any time in its own discretion. The Agreement, therefore, added nothing to the Master's traditional authority.

The next provision in the Article under consideration provides that the General Agent shall procure the crew for engagement by the Master, and it is upon this clause that the Government and the Respondent have leaned most heavily. It is urged on the basis of this clause that the General Agent does not "man" the vessel, and consequently cannot be considered to be an operator. This argument also falls by the wayside upon examination.

The practice of employing seamen has been controlled by statute (46 U. S. C. A. 713) since 1872, which Act also prescribes the form of agreement which must be entered into, and requires that it be executed by the Master on the one hand and the crew on the other. The operator of the vessel is designated at the head of the Shipping Articles, along with other statistical data, but this is outside of the Agreement, and *the operator is not a party to the Agreement itself.* Accordingly, in order to "man" its vessel, an operator "procured" the seamen from the Unions and

V. ARGUMENT

Summary of Argument

It is petitioner's contention that under the General Agency Agreement the vessels are physically delivered to the General Agents and remain in their custody during the entire period of the contract; that under the terms of the contract, the General Agents are required to manage and conduct the business of the vessels in a fashion similar in every material respect to the activities of vessel operators in private enterprise, subject only to nominal supervision of the United States. In private operation, the vessel operator engaged a shipmaster and placed the vessel under his control, as required by law; the operator then procured the crew for engagement by the master (not by the operator). The crew were then employed by the shipmaster in the presence of a United States Shipping Commissioner, in accordance with the terms of an agreement prescribed by United States statute. This contract of employment (Shipping Articles) was entered into solely between the shipmaster and the crew. The operator was not a party to the agreement, but was only designated as "operator" of the vessel at the head of the Shipping Articles, outside the framework of the agreement. When the shipmaster assumed command of the vessel, he exercised complete and exclusive control over the vessel in accordance with the license issued to him by the United States Government, until he was relieved of his command. The direct internal management and navigation of the vessel was the exclusive legal responsibility of the shipmaster. He executed his duties in accordance with instructions from the operator, except insofar as the vessel's operations were governed by Federal Regulations.

transported them to the office of the United States Shipping Commissioner, where they were engaged by the Master and signed on before the Commissioner as required by law. The operator's function in "manning" a vessel, thus, simply means that he must "procure" the men for engagement by the Master. The General Agency Agreement requires the Agent to "man" the vessel in precisely the same manner, and, in effect, insures the continuation of the same practice. It is inescapably clear that the General Agent was required to "man" the vessels under the Agreement just as vessel operators have always done in private enterprise. These facts clearly destroy the Government's attempt to distinguish this agreement on the basis of the "manning" clause.

Further examination of the Agreement emphasizes the complete dependence of the United States upon the General Agent for the operation of the vessels. The Government looked to the General Agent to "protect and safeguard the interests of the United States," (Art. 3B(a)); to "keep its books relating to the management, operation, conduct of the business," (Art. 4(a)); *to cooperate with the United States when the latter desired to inspect the vessels,* (Art. 14). The fact that the United States required the cooperation of the General Agent simply to make an inspection demonstrates how completely the Government was, in fact, divorced from possession and control of the vessel.

The compensation paid to the General Agent under the Agreement also throws some light on the character and substance of the General Agent's duties. Article 5 of the Agreement provides for "fair and reasonable" compensation to be determined by the Administrator, but does not outline any basis or formula. The Regulations, however, do provide several methods of payment. In some instances the General Agent receives a designated sum for each day

Such was the manner in which vessels in private enterprise were operated before the War. *This practice was not changed one iota in any material respect under the General Agency Agreements.* Far from changing the prior practice, the General Agency Agreement simply codified the practice under which private vessels had been operated since the earliest days of the American Merchant Marine. The identical method of "manning" the vessel was employed under the agreement as existed before; the internal and external management and navigation of the vessels was exactly the same under the agreement as prevailed before. The functions of the General Agents under the agreement are, for all practical purposes, precisely the same as those of private operators prior to the agreement.

Under these circumstances, a vessel operator has always been held liable to the seamen for damages, maintenance and cure, wages and loss of personal effects, arising out of the "service of the vessel". In the *Hust* case, the Supreme Court held that the General Agent had the exact same liability to the seamen as an operator.

The Court of Appeals below, laboring under an erroneous interpretation of the *Caldarola* decision, held the *Hust* decision to be overruled insofar as the General Agent's liability for all obligations other than damages to seamen (based only on negligence) were concerned. It is petitioner's contention that the *Caldarola* decision furnishes no basis for any such interpretation, but, on the contrary, left the *Hust* decision expressly undisturbed. It is petitioner's contention that the right to damages, whether based on negligence or unseaworthiness, and all of the other seamen rights which arise out of the "service of the ship", including maintenance and cure, wages and loss of personal effects, are all inseparably bound together and may not be

from the time the vessel is delivered to the General Agent until the date it is redelivered to the United States. Other methods of calculating payment are governed by the nature and amount of cargo transported and the amount of business done by the vessel. This type of compensation obviously contemplates daily operation of the vessel at sea, as well as in port.

Strong evidence that the parties themselves considered and contemplated that the General Agent would be liable as an operator is manifested in Articles 8 and 16 of the Agreement. Article 8 recognizes that the General Agent would be liable in connection with all the seamen's rights and also to third parties in connection with any damage to persons, vessels, or other property. Provision was accordingly made to indemnify the General Agent against all losses arising out of those liabilities. Article 16(a) would seem to be repetitious in again indemnifying the General Agent against all claims "of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels." There was apparently no doubt in the minds of the General Agents when the Agreement was being drafted that they would be held liable as operators, and they made doubly certain that they would be amply protected from loss.

In this connection, it is pertinent to note that the General Agents clearly held themselves out as the employers of the seamen to the insurance companies who were underwriting the risks. In *Wright* v. *Eastern S. S. Lines, Inc.* (D. C. S. D. N. Y.—Adm. No. 152), the insurance company wrote the following letter to the General Agent:

> "This is to advise you as Insured under Primary Commercial Blanket Bond No. S-50,223, issued by this Company in your favor and dated the 31st day of De-

divided or diluted by superimposing a new label upon an old status.

With respect to the effect of the Clarification Act, it is petitioner's contention that Congress never intended to interfere with the rights and remedies between the seamen and the General Agents, but the Act was passed to eliminate the confusion which had arisen as to the rights and remedies between the seamen and the United States. Prior to the passage of the Act, there was a question as to whether the seamen, since, technically, they might become employees of the United States, would be entitled to the benefits of the Federal Employees Compensation Act and other statutes applicable to Federal employees, or whether they were to be governed by the same rules applicable generally to seamen in private industry. The Act clarified this situation by taking the seamen out of the class of Federal employees and giving them the same status as other seamen. The Act does not attempt to define or affect any of the seamen's rights against the General Agents or any other entities other than the United States.

Petitioner makes the following contentions:

(1) Under the General Agency Agreement, the General Agents are vested with possession and management of the vessels, and are subject to the same liabilities attaching to any other vessel operator in private enterprise.

(2) All of the seamen's rights arise out of employment on the vessel and may not be destroyed or diluted by artificial distinctions.

(3) The Clarification Act is limited in its application only between the seamen and the United States and does not affect any rights between the seamen and the private operators.

First Point

The General Agent receives physical possession and custody of the vessel and manages it as an operator during the life of the General Agency Agreement.

In the District Court below, it was recognized that the General Agent was liable as an operator under the decision in the *Hust* case, but the action was dismissed solely upon the ground that all rights against the General Agent were wiped out by the Clarification Act. When the case reached the Court of Appeals, the Government appeared as *amicus curiae* and injected into the controversy an entirely different issue. It abandoned the argument which the District Judge had used in dismissing the complaint and supplanted it by a direct frontal attack upon the decision in the *Hust* case. It was argued that the decision in the *Hust* case was rendered by a majority of four Justices and that those four Justices now constitute a minority; ergo, their decision should be overruled. We fail to see the propriety or relevancy of such an argument, but the Court below was apparently impressed by the argument and accepted it, along with the argument which the Government made in the *Hust* case, that the General Agent was not an operator of the vessel.

While the argument advanced by the Government in the instant case was generally the same as it was in the *Hust* case, the Government, or to be more specific, the Maritime Commission, has changed its approach and now depends not upon the General Agency Agreement for support, but upon a self serving letter from counsel for the Maritime Commission. This letter was first introduced in the *Caldarola* case, and although there have been many cases before and since that decision where there was opportunity for the Maritime Commission to prove the allegations contained therein, it is

significant that the Maritime Commission has not once attempted to do so.

In the instant case, the Government has advanced many "facts" in addition to the aforementioned letter, without a single offer of proof, all of which would seem to have been accepted by the Court below. Your petitioner denies those facts with the utmost vigor and in all sincerity, but he is utterly helpless to combat them, since he has never had the opportunity to challenge them by cross-examination, and offer proof in rebuttal. We accordingly submit that the issue here should be determined from an examination of the agreement and other evidence in this and the records of other cases, and those matters of which this Court may take judicial notice.

The real and basic issue before this Court is whether the General Agent was actually the operator of the vessel on which the petitioner served as a member of the crew at the time of his injury. If the answer be in the affirmative, then it is immaterial that the General Agent was operating the vessel for or on behalf of a third party, for the liability here is urged against the actual operator and no one else.

In the determination of whether the General Agent is a vessel operator with all of the attaching liabilities, it is generally necessary to show a substantial measure of control over the vessel's operations. Where there is a substantial measure of control over the management coupled with possession of the vessel, the vessel owner may be held liable as an owner "pro hac vice", even though the general owner reserves to himself, by contract, a certain measure of control or management. *United States* v. *Shea*, 157 U. S. 178; *Hill* v. *Leeds*, 149 Fed. 878; *Leary* v. *United States*, 14 Wall. 607; *Reed* v. *United States*, 11 Wall. 591; *Clyde S.S. Co.* v. *United States Shipping Co.*, 152 Fed. 516; *The Del Norte*, 111 Fed. 542; *Richardson* v. *Windsor*, 20 Fed. Cas. 11, 795; *Webb* v. *Pierce*, 29 Fed. Cas. 17,320.

cember, 1945, that the words 'Employee' or 'Employees' as defined in the said bond shall be deemed to include the Captains and Crews of ships owned by the United States of America and operated by you under a Service Agreement with the War Shipping Administration."

In summary, the examination of the General Agency Agreement leads only to the conclusion that the General Agent was intended to be an operator with possession and control of the vessel.

The Operations Regulations proved the General Agent to be the real operator of the vessel.

Further evidence of the General Agent's heavy hand in the operation and management of the vessel is furnished by various Operations Regulations issued to General Agents by the War Shipping Administration. These regulations likewise completely negate the suggestion that the Agent merely managed the "accounting and other shoreside activities" of Government-owned vessels, or that the General Agent's activities "stop at the water's edge," contentions variously made by both the Government and the General Agent in litigations presently pending. (See Government's Brief Amicus Curiae in *Aird* v. *Weyerhaeuser Steamship Company* and in the instant case, both decided the same day by the Court of Appeals for the Third Circuit.)

Operations Regulation No. 111 provides that "all W. S. A. owned vessels may carry the stack markings of the General Agent to whom assigned." Surely such a privilege would not be accorded to a shoreside agent. It was notice to all the world that the vessel was being operated by the General Agents.

Operations Regulation No. 4 provides: "*General Agents shall assign to each new vessel . . . a master, chief*

mate, chief engineer and first assistant engineer, approximately thirty (30) days prior to the completion and delivery date. All other officers and department heads, including radio operators and chief stewards, as authorized by War Shipping Administration shall be assigned approximately ten (10) days prior to such date . . . The unlicensed personnel, except as otherwise provided for herein, shall be placed on the vessel effective as of the date of *delivery to the general agent.*" This Regulation clearly confirms not only delivery and surrender of possession of the vessel to the General Agent, *but that the Agent also manned the vessel.*

Regulation No. 9, Supplement No. 1 provides: "General Agents are *authorized and directed to employ* as a member of the crew, one junior third mate . . . . The term of employment shall be in accordance with the General Agent's applicable collective bargaining agreement . . ."

Regulation No. 42 involves safety precautions aboard merchant vessels and provides: "General Agents . . . are therefore directed to *instruct the master and chief engineer* aboard each vessel to ascertain prior to proceeding to sea, the condition of the floor plates in the engine room and fire room of their vessel . . . to take the necessary steps to have them firmly bolted."

Regulation No. 43 involves fuel oil conservation and provides: "General Agents are directed to *instruct masters* that wherever practicable, water shall be utilized for ballast purposes in lieu of fuel oil."

Regulation No. 50 involving crew advances in foreign ports provides: "General Agents are . . . directed to *caution masters and crews* of vessels calling at ports in foreign countries to discontinue payment in dollar currency

and to refrain from transactions in United States money . . . . *General Agents are authorized to empower the masters* to convert local currency to United States dollars . . ."

Regulation No. 51, Supplement 2, relates to pollution of navigable waters of the United States and provides: "All agents of the War Shipping Administration are hereby directed to give a copy of this Regulation to the master of each vessel . . . . *Masters shall be instructed* to post this matter on the ship's bulletin board or otherwise bring it to the attention of all ship's personnel."

Regulation No. 52 provides: "General Agents are therefore directed *to instruct masters of all vessels* . . . to keep shaft alley doors closed at all times except when it becomes necessary to fill bearing reservoirs to make repairs . . . . General Agents are further directed to *instruct masters* that a notice to this effect must be posted adjacent to the shaft alley door . . ."

Directive No. 1 dated October 8, 1942 addressed to all General Agents provides: "You are instructed to place a copy of this communication together with a copy of this letter in the hands of all *masters and officers in your employ.* You are also instructed to place a copy of this communication on the bulletin board in the crew's quarters or in a position where it may be seen by all crew members." (Note the explicit recognition on the part of the Government that both the master and the officers are employees of the General Agent).

Directive No. 2 dated October 8, 1942 provides: "*All operators have been instructed by the War Shipping Administration that failure to support the master and his officers in the lawful execution of his duties will not be tolerated.*" (Note the express recognition of the General Agent as operator of the War Shipping Administration vessels).

Regulation No. 56 requires the General Agent to *instruct masters* to familiarize themselves with protective measures relating to anti-gas preparations for merchant vessels.

Significant also is Regulation No. 63 concerning the employment of staff officers and provides: "General Agents of all vessels . . . *are directed to employ* instead, a junior assistant purser at a basic monthly salary of $120.00 . . . The Maritime Training Service has been training combination junior assistant purser pharmacist's mates. General Agents are *authorized* to employ these graduates of the Service if desired on ships not carrying a doctor.

Regulation No. 12 provides: "In accordance with Article 14 of Service Agreement, Form GAA, the *General Agents are required* to arrange for the maintenance of vessels for the account of the United States."

Regulation No. 3 relating to maintenance and repair provides: "In connection with repairs on vessels *operated by your company* for account of War Shipping Administration, we are enclosing herewith for your information and guidance one copy of maintenance and repair regulations . . . ." (Note express recognition that vessels are operated by the General Agents).

Regulation No. 3 further provides: "The attention of General Agents is directed to the provision of the service agreement (Form GAA) under which procuring of repairs to the extent authorized *is the responsibility of the general agent* . . . General Agents may award work to or enter into contract with any interested or related company only pursuant to Article 13 of the General Agency Agreement."

Thus, running all through the Regulations is the consistent recognition that the General Agent is the "operator" of the vessel and the "employer" of the crew. It is clear also that the Government recognized the General

Agent as the proper party to "instruct the Master" and other personnel on the vessel.

Although the United States, as owner, retained a certain measure of control necessitated by wartime exigencies, it was left to the General Agent to operate the vessel for all practical purposes, and in this situation the reserved powers of the Government cannot serve to lessen the liabilities of the operating agent with respect to any persons not a party to the General Agency Agreement.

The Caldarola Case

In order to fully comprehend the Caldarola case, it is essential to inquire into the basis upon which the New York Court of Appeals in that case disposed of the question of liability. Caldarola's injuries resulted from the breaking of a cargo boom, part of the ship's gear, which, the jury held was defective. Liability was predicated upon the theory that defendant, the General Agent, owed him a duty to keep the ship in repair, and that such duty arose from the terms of the General Agency Agreement. The case was argued on common-law principles applicable to the landlord-tenant relationship, and was decided on the basis of *Cullings* v. *Goetz*, 256 N. Y. 287, the leading New York case on the subject.

Cullings v. *Goetz* involved an oral lease of certain premises, including a public garage, by the defendant-lessor to the lessee, who was a co-defendant in the case. Plaintiff, a third party who was on the premises as an invitee at the time, was injured by reason of the defective condition of one of the garage doors, and brought suit against both lessor and lessee, basing liability as to the lessor upon the theory that the lessor had agreed to make necessary repairs, and that his failure to do so after notice of the defective condition, constituted negligence for which the lessor was responsible to the plaintiff. The Court of Appeals

by Cardozo, J., rejected plaintiff's contention, as applied to the facts of the case, upon the ground that a mere promise by a lessor to repair cannot charge him with liability in tort to third persons for failure to keep his promise, *where under the lease exclusive possession and control over the premises is vested in the lessee.* The following excerpts from the opinion clearly disclose the theory underlying the Cullings decision:

> (256 N. Y. at pp. 290-291): "The subject had divided judicial opinion. Generally, however, in this country as in England, a covenant to repair does not impose upon the lessor a liability in tort at the suit of the lessee or of others lawfully on the land in the right of the lessee (citing cases). There are decisions to the contrary (cases cited) but they speak the voice of a minority. Liability in tort is an incident to occupation or control (American Law Inst., Restatement of the Law of Torts, Sec. 227). By preponderant opinion, *occupation and control are not reserved through an agreement that the landlord will repair* (citing authorities). The tenant and no one else may keep visitors away till the danger is abated, or adapt the warning to the need . . . . *In saying this we assume the possibility of so phrasing and enlarging the rights of the lessor that occupation and control will be shared with the lessee.* There are decisions in Massachusetts that draw a distinction between a covenant merely to repair *and one to maintain in safe condition with supervision adequate to the end to be achieved* (citing cases). In the case now at hand, the promise, if there was any, was to act *at the request of the lessee. What resulted was not a reservation by an owner of one of the privileges of ownership. It was the assumption of a burden for the benefit of the occupant with consequences the same as if there had been a promise to repair by a plumber or a carpenter.*" (Emphasis supplied).

In brief, all that *Cullings* v. *Goetz* held was that the mere promise to repair premises does not reserve occupation and control, and does not impose a duty upon the lessor toward third persons, where the lessee has *exclusive possession and control* over the premises and the lessor does not expressly reserve any privileges of ownership. *The opinion recognizes that the engagement between the parties may be so framed that occupation and control will be shared by the lessor with the lessee, in which event liability to third persons is clearly indicated.* Seizing upon this decision the New York Court of Appeals in *Caldarola* (1945 A.M.C. 1319), in an opinion not notable for its clarity, came to the conclusion that New York law requires exclusive possession and control for the imposition of tort liability. That the New York Court saw fit to indulge in such unwarranted extension of the *Cullings* v. *Goetz* doctrine is, perhaps, beside the point. What is of the utmost significance, however, is that with the case reaching the Supreme Court of the United States in this posture (and that Court having determined in limine that in an action brought in the New York Courts the kind of possession and control which New York requires as a basis of tort liability to third persons is the exclusive concern of the New York Courts), the Supreme Court restricted its consideration of this phase of the case to an inquiry directed solely to the question whether the General Agent was an owner *pro hac vice*. In so doing, it is evident that the Supreme Court did not even impliedly approve the New York Court's patent and unwarranted extension of the *Cullings* v. *Goetz* doctrine. It simply considered itself foreclosed from entering into any such inquiry.

That *Cullings* v. *Goetz* does not justify the result reached by the New York Court of Appeals in Caldarola, and assuredly does not justify any such result in the case at bar, is evident from a consideration of the elements of posses-

sion and control heretofore discussed. The General Agent here does not stand on the same footing as an owner who has completely surrendered possession and control of the premises. Contrary to being an owner out of possession and control, the General Agent had taken possession of the vessel from the owner, had undertaken to operate and maintain the vessel, and had assumed management and control. He had a direct and substantial hand in the management of the business of the vessel, as contrasted to the lessor in the *Cullings* case who had nothing whatever to do with the business being conducted on the demised premises. The General Agent undertook in fact to equip, victual, supply and man the vessel. It undertook to maintain the vessel in trade. In operating the vessel, it tended to all of the details of operation, following regular commercial practices wherever the necessities of wartime operations did not require intervention by the United States. In all phases of activity it was in direct contact with the master, the officers, and members of the crew. It gave directions and instructions to the master and personnel of the vessel. It was the employer of the master and crew and was clothed with the incidents flowing from that relationship. The master himself, irrespective of his relationship to the United States, was, in fact, an agent of the General Agent, and acted for it and in its behalf. To contend that the General Agent, in this situation, is comparable to the lessor in *Cullings* v. *Goetz, supra,* is to ignore reality. Such result could have been reached only by a Court whose members are wholly unfamiliar with the maritime law and who have not been conditioned in the law of the sea.

In point of fact, the majority opinion of the Supreme Court in Caldarola did not in any sense undertake to decide what the liability of the General Agent would have been

under admiralty principles. Mr. Justice Rutledge's dissent, on the other hand, did, in the following terms:

> (U. S. p. 165, L. Ed. p. 1975) "Regarding the case, as I do, as being controlled in its substantive aspect altogether by Federal law, I do not think that law requires or should permit the result the court reaches. Regardless of whether the so-called 'agency' contract makes the operating company an 'agent,' an 'owner *pro hac vice*,' or technically something else in relation to the United States, the federal maritime law in my opinion well might hold responsible to an injured longshoreman one who has knowledge that such persons will come aboard and who undertakes to keep the vessel and its equipment in safe condition for their use. (Citing Restatement, Torts, Sec. 383, and Restatement, Agency, Sec. 355.) More especially should such a rule apply when the person so undertaking is the only one constantly on board to observe the creation of hazardous risks in the vessel's daily routines, and, in addition, has such a degree of control over their creation as the 'agent' did here."

There is, therefore, persuasive authority for the proposition that had Caldarola proceeded through the Federal Courts, according to admiralty principles, his claim for damages would have been sustained. And this is so because common-law concepts of possession and control of shoreside premises simply do not fit into the scheme of the maritime law, any more than do the common-law concepts surrounding the master-servant relationship. (*Cf. Waterman Steamship Co.* v. *Jones*, 318 U. S. 724, 87 L. Ed. 1107; *Hust* v. *Moore-McCormack Lines, Inc., supra.*) As Mr. Justice Rutledge pointed out in that phase of his dissent in Caldarola which the majority had no occasion to pass upon (i.e. liability under the maritime law) and which remains unchallenged by any authoritative expression of any of the Federal Courts:

(U. S. pp. 165, 166, L. Ed. pp. 1975, 1976): "Whether this (liability) is put upon the ground stated in the opinion of Mr. Justice Douglas, that the 'agent' became owner pro hac vice, or in view of the contract taken in the Hust case, with reference to application of the Jones Act, is largely immaterial, perhaps only a matter of words.

"That view, incorporating the rule of the Hearst case, we have only recently extended to apply in cases of coverage of the Social Security Act and the Fair Labor Standards Act. United States *v.* Silk, 331 U. S. . . .; Harrison *v.* Greyvan Lines, id; Rutherford Food Corp *v.* McComb, 331 U. S. . . . While the liability here is not legislative in origin, nevertheless as in the Hust case, application of the common-law 'control test' to defeat the longshoreman's remedy . . . cannot 'be justified in this temporary situation unless by inversion of that wisdom which teaches that "the letter killeth, but the spirit giveth life"' 328 U. S. at 725."

Caldarola v. *Eckert*, *supra*, does not, under any view of the matter, foreclose recovery in the case at bar, for here the General Agent was, in fact, in possession of the vessel and assumed that measure of management and control as, under admiralty principles, must necessarily lead to liability. And although a finding that the defendant here was owner "pro hac vice" is not essential, we respectfully suggest that upon the face of this record such a holding is strongly indicated. For while the Supreme Court in Caldarola felt that the consequences to the interests of the United States would be too far-reaching "to warrant such a forced reading" of the contract, merely to lay the basis for liability, the certificates of delivery and redelivery were not before that Court, and what may have appeared as a "forced" construction without them, becomes the only reasonable and logical conclusion in the face of the present record.

The General Agency Agreement here is in all material respects the same as the "agency" agreement, under which vessels were being operated for the United States before the war. It was attempted in connection with those agreements also to absolve the "Agents" of liability arising out of the operation of the vessels. In *Quinn* v. *Southgate Nelson Corp.*, 121 F. (2d) 190, cert. den. 314 U. S. 682, (the decision and reasoning of which was cited with approval and relied on in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, where the Court reached the same conclusion on similar facts), the Court found that the Agent must bear the same liability as the United States in a carefully thought out and comprehensive opinion holding the Agent liable for injuries due to the negligent navigation of the vessel, as follows:

> "The District Court was amply justified in finding negligence in the operation of the Waukegan. *The only question deserving discussion is whether the negligence is attributable to appellant, the managing agent of the vessel.* Appellant contends that the judgment against it was erroneous because the United States or the Maritime Commission is liable to appellee; it cites an opinion to the effect that the United States is liable, by the Attorney General, in 1925, construing a form of contract used by the United States Shipping Board, which appellant asserts to be similar to that involved here. But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, *it does not follow that appellant is exculpated.* That a principal is liable for a wrong does *not necessarily immunize his agent.* Blumenthal & Co. *v.* United States, 2 Cir., 1929, 30 F. 2d. 247, 248, 249; Sloan Shipyards *v.* United States Fleet Corp., 1922, 258 U. S. 549, 567, 568, 42 S. Ct. 386, 66 L. Ed. 762. The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-

stringed bow. It is irrelevant here, whether at common law or by statute, appellee has a cause of action against the United States or the Commission for whatever amounts either of them may be obligated to pay appellee. Common sense and the precedents make appellant liable on the facts of this case. *It had a most substantial measure of control over the operation of the vessel; it was paid to 'manage, operate and conduct the business of the line.' The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of de facto control, and there is no showing that in fact the owner did substitute itself as manager, either generally or at the time of this accident. Even if the Maritime Commission selected the officers, as appellant contends, appellant was not ousted of control.* We think our opinion in United States Shipping Board Emergency Fleet Corp. *v.* Greenwald, 16 F. 2d 948, which held a managing agent with similar powers liable for the death of a seaman, is applicable here, although in that case the managing agent had an interest in the profits. That the compensation appellant received from the Maritime Commission was relatively small is of no importance, *for that was a matter of contract between it and the Commission, and cannot affect appellant's liability to third persons.*"

The foregoing reasoning was adopted in the *Brady* and *Hust* cases and is equally applicable to the instant one. There is the same measure of control involved and this case is not complicated by any state rules of law as appeared to be the situation in Caldarola.

With respect to the nature and degree of control exercised by the General Agent, it is significant to note that although the Government has urged the acceptance of certain "facts", it has never once undertaken to offer any proof in support, despite the fact that there has been more than ample opportunity to have done so. On the other hand, in *Fink* v. *Shepard S.S. Co., supra,* the parties did

not offer such proof as was then available, and the Court found from that evidence that the General Agent was the operator of the vessel, in fact, independently of the provisions of the agreement. There is, moreover, other evidence which was developed by the National Labor Relations Board, which is a complete and conclusive answer to the issues under consideration. In *Barge Carriers, Inc.* v. *Atlantic and Gulf Seafarers International Union* (N.L.R.B. Case No. 10-c-1382), the Board, after making its own investigation and conducting hearings, found from the evidence that the General Agent was the real operator of the vessel and the employer of the seamen. This finding of the Board squarely refutes the statements of "fact", as well as the contentions advanced by the Maritime Commission in this case. A consideration of the irreconcilable findings of these two branches of the Government makes it pertinent to point out that on the one hand the statements of the Maritime Commission are nothing more than unproved allegations of a not impartial agency (the Maritime Commission has intervened in effect as a party defendant in all of this type litigation and has had a measure of control over the litigations from the outset). On the other hand, the Board cannot be said to have had any "feelings" in the matter, but reached its conclusion from a study of the proven facts. Under these circumstances, the findings of the Board are entitled to great weight to the exclusion of the unproven declarations of the Commission counsel. A few brief excerpts from the Board's findings completely destroy the mantle of immunity which the Commission has attempted to build around the Agent, as follows:

> "The respondent contends that the United States, and not itself, is the employer of the employees here concerned and that, in accordance with Section 2 (2) of the Act,[2] the Board lacks jurisdiction over it."

In developing the facts, the trial examiner found:

"After carrying general cargo between Port Everglades, Florida, and Havana, Cuba, on two voyages, the respondent informed the W.S.A. that it could not continue this service since it resulted in an operating loss. The W.S.A. then stated that it would 'take over' the vessels and that the respondent would operate them for the W.S.A. Early in October, the W.S.A. took possession of the vessels, which the respondent had operated, on a bare-boat charter basis. The United States, acting through the W.S.A., and the respondent entered into a service agreement. This agreement, termed in the record as the General Agency Agreement, defines the duties and responsibilities of the respondent with respect to vessels of which the W.S.A. is owner or, under bare-boat charter, owner *pro hac vice*, which may be assigned to the respondent as general agent of the W.S.A. . . ."

. . . . . .

"Although the execution of the General Agency Agreement thus circumscribed the respondent's control over the operation of the vessels, *no substantial change occurred in the relationship* between the respondent and the employees here concerned in respect to their wages, hours of employment, and similar conditions of employment. *The respondent still hires the master, subject, however, to the approval of the W.S.A., and may discharge him* . . ."

. . . . . .

"The respondent maintains the basic scale of wages which it had established prior to the execution of the General Agency Agreement. Subsequent to the execution of the General Agency Agreement, a representative of the W.S.A. requested information of the respondent as to the 'wage schedules, overtime rates and working conditions of the personnel on tugs and barges operated by' the respondent for the account of

the W.S.A. After submitting such information, the respondent was told to maintain its existing wage scale and other labor relations policies while operating for the account of the W.S.A. *The W.S.A. has not otherwise exercised any control over the hire and tenure of employment, wages, hours of duty, or other conditions of employment of the personnel aboard the vessels operated by the respondent. And it is plain from the testimony of members of the crew that they regard the respondent, and not the W.S.A., as their employer.*"

The trial examiner then summarizes the result of the findings, as follows:

"From the foregoing findings, considered in the light of the entire record, the undersigned is convinced that the respondent is the employer of the employees here concerned, within the meaning of the Act. *The acquisition by the W.S.A. of the vessels and the execution of the General Agency Agreement effected no change in the relationship between the respondent and the employees here concerned.* Nor, despite the control exercised by the W.S.A. over the sailings and cargo of the vessels, has there been any change in, or attempt by the W.S.A. to change the working conditions of the employees. *Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only nominal supervision of the W.S.A.* The creation of the W.S.A. and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the W.S.A. over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the Act, the Congress can not have intended the exception to apply to a situation in which, *for all practical purposes, the essential elements of*

the employer-employee relationship remain in the control of the private operator, under only nominal and temporary supervision of the W.S.A. In the Cosmopolitan Shipping Company case,[1] in which the contractual relationship between the United States and the company there involved was substantially the same as that between the United States and the respondent, the Board said:

It appears to us that the Government, in turning over the operation and management of its vessels to a private corporation under the existing Agreement, has avoided, rather than assumed, the responsibilities of an employer. It has established the American France Line as a commercial venture, operating in competition with other lines. In the conduct of the business of the line, *the Company is in full charge*, receiving compensation based on the results of its own efforts. The Company, under the nominal supervision of the Government, *does the actual hiring of the employees and has the sole direction of their activities while engaged in their duties on board the vessels.*

* * * * * * *

"The undersigned finds that the respondent is an employer of the employees aboard the vessels *operated* by the respondent, within the meaning of the Act."

Comparison of these proven findings of fact with the reckless *ex parte* statements of the Commission requires an unqualified rejection of the latter. The conclusion is inescapable that the General Agent has such a substantial measure of control over the vessel's operations as to make it liable both as an operating agent, as well as an owner "*pro hac vice*". This view supports the same conclusion reached from an analysis of the agreement itself and of the other data in the record, and is likewise sustained by the decision in the *Hust* case, which, far from being overruled, was expressly affirmed by the *Caldarola* decision.

The control and supervision which the United States exercised over the activities of the Merchant Marine during the war did not substantially impair the control of the General Agent. It is true that the Government exercised a measure of control, but it was restricted to a very narrow field and it was imposed only insofar as it was necessary and expedient to the successful prosecution of the war effort. The maritime industry did not stand alone in this respect: Landowners operated under rent control; industry operated under price rationing, wage and manpower controls; all for precisely the same reason. Such control as the Government exercised over these activities no more impaired the rights and liabilities of the operators of these enterprises than did the comparable Governmental control in the maritime field. The destination of the cargo, the route to be followed, the safety precautions to be taken, and other similar matters had to be subject to military control for security and military reasons. In all other respects, however, the General Agent operated the vessel with all the duties and liabilities incident to such operation. In brief, such Government supervision as was imposed, made necessary by wartime conditions, did not destroy the legal incidents flowing from the private operation and management of wartime industries, of which the Merchant Marine was an integral part.

All of the seamen's rights are inseparably bound together by virtue of their relationship to the vessel and every such right may be asserted with equal force against the General Agent.

The only reasonable deduction to be drawn from the foregoing considerations is that the General Agent is liable in connection with all of the seamen's rights and not just a part of them. The decision of the Court of Appeals makes

a distinction between claims specifically based upon the Jones Act and all others. The gist of the opinion is that only damage claims based on negligence may be prosecuted against the General Agent, to the exclusion of all other claims. This means that damage claims based upon unseaworthiness, as well as claims for maintenance and cure, wages and loss of personal effects, may not be advanced against the General Agent.

Such a view fails to contemplate the real remedy provided by the Jones Act, as well as the real basis of the liability for all these rights.

The Jones Act did not provide any separate rights as such, but rather incorporated all the statutes relating to railway employees into the maritime law, and the remedy, as the Court pointed out in *Panama R. R.* v. *Johnson*, 264 U. S. 375, is under the maritime law as modified by the Jones Act. See also *Brown* v. *Mallory*, 122 F. (2d) 98; *German* v. *Carnegie-Illinois Steel Corp.*, 156 F. (2d) 977. Among other things, the Railway Acts abolished the fellow servants doctrine and gave rise to a cause of action for negligence. The foregoing authorities make it clear that in any action for damages a cause of action exists if there by any unseaworthiness or negligence, and although the actions have loosely been characterized in some instances as "Jones Act cases", actually, they are governed by the maritime law with the Railway Acts incorporated. The effect of the decision below would split this cause of action into two parts so as to allow a recovery against the General Agent based on negligence of fellow servants, but not if based on unseaworthiness, and thus conflict with the very purpose of the Jones Act.

The decision below would also absolve the General Agent of any liability for maintenance and cure and here again the Court overlooks the real basis for the liability. The

Court below recognized that there is a liability under the Jones Act against the General Agent. *A fortiori*, there must be a legal duty, the violation of which is redressable under the Jones Act. The law is clear that the failure to provide maintenance and cure is a tort giving rise to an action under the Jones Act. It must, therefore, follow that there is a duty on the part of the General Agent to provide maintenance and cure in the first instant. In *Cortes* v. *Baltimore Insular Lines*, 287 U. S. 367, the suit was for damages based on the failure to provide maintenance and cure. In holding that the duty to provide maintenance and cure arises out of the employment and that the violation of the duty constitutes a tort, Mr. Justice Cardozo said:

> ". . . A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.' The duty to make such provision is imposed by the law itself as one annexed to the employment. The *Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, supra. Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident. *If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt.*"

> . . . . . .

> "We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties."

> . . . . . .

"So, in the case at hand, the proper subject of inquiry is not the quality of the relation that gives birth to the duty, but the quality of the duty that is born of the relation."

* * * * * * *

"Here performance was begun when the vessel started on her voyage with Santiago aboard and with care and cure cut off from him unless furnished by officers or crew. *From that time forth withdrawal was impossible and abandonment a tort.*"

The foregoing case, thus, not only points up the liability of the General Agent for maintenance and cure and wages, as well as for damages, but it also illustrates the intimate relationship between the General Agent and the vessel's operations. For, even though the vessel may be on the high seas, it is the General Agent's duty as vessel operator to furnish medical care to an injured seaman, and this can only be done by the ship's officers or crew. The failure of the latter to render proper care renders the General Agent liable just as in the *Hust* case, the negligence of a member of the crew causing an injury to another rendered the General Agent liable there.

This case pointedly illustrates the inseparable quality of the seamen's rights and the urgent necessity to assert them against the General Agent, both upon principle, as well as from consideration of policy. The *Hust* decision is explainable on no other hypothesis except that the officers and members of the crew are, in the performance of the ship's work, rendering services for the General Agent. It is the traditional obligation of the Master and officers of a vessel to provide proper and adequate medical care to a seaman injured or falling ill in the service of the ship. *Cortes* v. *Baltimore Insular Line, supra.* The discharge of this obligation is as much a part of the ship's work as is the naviga-

tion of the vessel. If a seaman is injured through faulty navigation, his right to recover against the General Agent is clear under the *Hust* decision. Should he be injured through the failure to provide adequate medical attention or the negligent administration of medical aid, his rights against the General Agent must be equally clear, for here also the negligent act is performed in the ship's service, and *a fortiori*, in the course of employment. To hold otherwise is to indulge in metaphysical distinctions which would cut the heart out of the protection intended by the Jones Act. *Cf. Waterman Steamship Corp.* v. *Jones*, 318 U. S. 724. In brief, any attempt to isolate the seaman's remedies into so-called "Jones Act rights" as against maritime rights must not only lead to consequences which are incongruous, but which must inevitably result in a destruction or dilution of the seamen's rights and remedies. The distinction which the Court below makes between "Jones Act" and other cases serves only to emphasize the basic fallacy in the Court's finding.

The Clarification Act

Under the law prior to the passage of this Act, the seaman had the right to bring suit against the Government under the Suits in Admiralty Act (46 U.S.C.A. 741, *et seq.*) for any cause of action arising on a merchant or a public vessel owned by the United States. *American Stevedores* v. *Porello*, 330 U.S. 446; *Canadian Aviator Ltd.* v. *United States*, 324 U.S. 205; *United States* v. *Marine*, 151 F. (2d) 742. Because the seamen on Government-owned ships were considered to be technically employees of the United States, it was felt that the rights and remedies of these men might be confused with the rights applicable to Federal employees generally, such as the Federal Employees Compensation Act and the Civil Service Retirement Act. There was thus the likelihood that the seamen, as Federal em-

ployees, might be limited to the rights of Federal employees to the exclusion of their rights as seamen under the maritime law. The Clarification Act was expressly designed to clarify this situation and preserve the rights under the maritime law to the exclusion of any other laws. The section of the Act which preserves the rights under the maritime law is as follows:

> "Officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, (chapter 7 of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels."

The following provision then takes the seamen out of the category of regular Federal employees:

> "Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended (chapter 15 of Title 5); the Civil Service Retirement Act, as amended (chapter 14 of Title 5); the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress) (sections 1001-1017 of this Appendix; Title 5, sections 691, 693, 715; Title 34, Section 943); or the Act entitled 'An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United

States and certain other persons or reimbursement therefore', approved December 2, 1942 (Public Law 784, Seventy-seventh Congress) (Title 42, sections 1701-1717)."

* * * * * * *

"Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act (Title 46, Sections 741-752), notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

The Act thus eliminated from the picture the possible application of the rights of Government employees and insured to the seamen their rights as seamen to be administered under the Suits in Admiralty Act.

It has been suggested that this excerpt of the Act, because it prescribes the method of enforcement against the United States, it thereby prohibits any suit against the private operator. This is a construction which is wholly foreign to the letter and spirit of the Act. This entire section will be read in vain for any suggestion that Congress intended to affect the rights or liabilities of the private operator, or any entity other than the United States. Had Congress intended to wipe out the suits against the private operators, it unquestionably would have done so (if it was constitutionally possible*) in the most clear, unambiguous and express language. It certainly would not have left such an important matter to implication. In this connec-

* In *Panama Railroad* v. *Johnson*, 264 U. S. 375, the Supreme Court said that when the constitution was adopted it incorporated into it the maritime law as it then existed, and while the maritime law can now be changed, altered or amended, it can only be done within certain limits. Nor can anything be taken out of that law which is an inherent part of it, and nothing can be added which changes the characteristic features of the maritime law.

tion, it is extremely significant to note that in Section 4 of the Act (50 App. 1294), in allowing for limitation of liability, Congress specifically mentions the private operators and makes them eligible for the benefits of the limitation of liability statutes. If the statute wiped out the remedy against the private operator, why then was it necessary to provide limitation of liability? Moreover, since Congress recognized the identity of the private operators and made special provision for them under the limitation of liability Acts, why then did Congress not mention the private operators elsewhere in the statute if it intended to give them immunity along other lines? The answer undoubtedly is that Congress never intended to disturb the relationship between the seamen and the private operators. A review of the authorities clearly sustains this view.

The Clarification Act did not affect any rights between the seamen and private operators.

In *Hust* v. *Moore-McCormack (supra)*, while the cause of action arose before the effective date of the Clarification Act, and while the Supreme Court specifically stated that it was not passing on the prospective application of the Act, the Court, however, in order to cope with the problem before it, was required to make a most comprehensive analysis of the Act, and in arriving at its ultimate decision, the Court made certain significant observations which are highly pertinent in the controversy at bar. After reviewing the entire history of the Act, the Court said:

> "A further word remains to be said about the legislative history of the Clarification Act in general. Both parties have relied strongly on excerpted portions thought to support their respective views. As is true with respect to all such materials, it is possible to extract particular segments from the immediate and total context and come out with road signs pointing in

opposite directions. We do not undertake to illustrate the contrast from the history in this case. It can be said, however, with assurance that, taken as a whole, the committee reports in Congress, together with appended documents from various affected agencies and officials, are amorphous in relation to the crucial problem presented in this case. All of them give evidence of concern that rights may have been lost or rendered uncertain by the transfer, and that action should be taken by Congress to preserve the substantive rights intact and remedial ones at the least by extension of the Suits in Admiralty Act to cover them.

The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly by virtue of the transfer. Whether or not this conserving intent was made effective in the prospectively operating provisions of the Act, it is made clear beyond question in the retroactive ones. Congress was confessedly in a state of uncertainty. But, being so, *it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character.* Its object, in this respect at the least, *was to preserve them and at the same time to provide an additional assured remedy in case what had been preserved might turn out for some reason to either be doubtful or lost.*" (Emphasis supplied)

It is clear from the foregoing language that Congress intended to insure to the seamen the rights under the maritime law in the event their relationship to the United States, and the possible application of the Compensation Act, *inter alia*, should prejudice those rights under the maritime law. It was nowhere contemplated that this Act should affect the relationship between the seamen and the private operators, much less curtail any rights of those seamen.

In *Cohen* v. *American Petroleum Corporation*, 1947

A. M. C. 336, the New York Court reached the same conclusion. In first setting forth the issue, the Court said:

> "The Fort Laramie was being operated by the defendant for the War Shipping Administration under an agreement similar to that involved in Hust *v.* Moore-McCormack Lines Inc., — U. S. —, 1946 A. M. C. 727, June 10, 1946. And the question to be decided, before going into the merits of the action, is whether the plaintiff may sue the operating company at law under the Jones Act or whether, as the defendant contends, plaintiff is limited to a suit against the United States under the Suits in Admiralty Act (46 U. S. C. sec. 741, ff.).
>
> On the basis of the Hust decision, this question would of course be decided in favor of the plaintiff were it not for the defendant's contention that the Act of March 24, 1943, defining the rights of seamen employed through the War Shipping Administration ('Clarification Act,' Stat. 45; 50 U. S. C. Appendix, sec. 1291) compels seamen to sue under the Suits in Admiralty Act. The Hust case held that a seaman on a merchant vessel operated by a private shipping company under arrangement with the War Shipping Administration could sue the operator at law under the Jones Act. The Court thought that whether seamen on such vessels, are 'technically' employees of the United States or of the shipping company, it would require more than logical deduction from the premises that the United States is the owner of the vessel and the operator only the agent to conclude that the Jones Act denies seamen a recovery at law against the operator and limits them to a recovery under the Suits in Admiralty Act, but with the substantive benefits of the Jones Act. To repeat another court's paraphrase of the Supreme Court language, 'the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act' (Militano *v.* United States, 1946 A. M. C. 1145, at 1147; 156 F. (2d) 599, 602).
>
> Hust had been injured on March 17, 1943; the statute now in question was passed a week later. Does the

act of March 24, 1943, change the situation? The question was deliberately and necessarily left open in the Hust decision, 1946 A. M. C. 741-2."

The Court then points out that the Act was intended to avoid confusion and duplication of benefits under different acts applicable to government employees:

> "As the legislative history of the Clarification Act shows, there had been considerable doubt in the early part of the war period as to the rights and remedies of seamen on vessels operated by private steamship companies for the War Shipping Administration; there had been 'confusion and duplication of benefits.' Were these seamen employees of the government; did they have the rights of government employees as to compensation benefits for injuries, as to retirement provisions? Could they in addition recover under the Jones Act; and in what tribunal was an action to be brought? Were the private operators liable? (Senate Report No. 62, 78th Congress 1st session; H. Rep. No. 2572, 77th Congress, 2d session; H. Rep. No. 107, 78th Congress, 1st session.)"

The text of the Act itself is then referred to independently of the committee reports and the Court concludes that it clearly refers only to the liability of the government to the seamen and not to any liability of the private operators, as follows:

> "The act was passed so as to define the rights of such seamen once and for all, but it is plain from a reading of the statute itself and without the aid of the committee reports that what was intended to be fixed was the liability of the government toward the seamen; the rights and obligations of seamen vis-a-vis the government were alone in the question. The statute provided that because of the temporary wartime character of their employment by the War Shipping Administration, seamen 'employed

* * * as employees of the United States through the War Shipping Administration' were 'not to be considered as officers or employees of the United States for the purposes of the U. S. Employees Compensation Act, * * * the Civil Service Retirement Act,' &c. They were, however, to 'have all of the rights * * * under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels,' that is to say, among other rights, those under the Jones Act. And those rights could only be enforced in admiralty under the Suits in Admiralty Act. *Is it not clear that Congress was speaking only of seamen who, it thought, were employees of the United States and only of the obligations which the United States as employer owed them?* It may be that Congress, taking a narrow view of the decision in Brady *v.* Roosevelt Steamship Company, 317 U. S. 575, 1943, A.M.C. 1, believed that there was no liability upon the part of the operating companies and that only the government was liable; and it was providing the basis of government liability and the court which would enforce it. It may be that Congress did not foresee that the Supreme Court in the Hust case would permit a recovery against the operating companies without reference to the question whether seamen could also sue the government. These doubts of Congress and its uncertainty as to the posture of affairs were reflected in Mr. Justice Rutledge's references to the act in the Hust case. 'We need not determine in this case whether prospectively the Clarification Act affected the rights of the seamen against the operating agent and others, or simply made sure that his rights were enforcible against the Government' 1946 A.M.C. 741-2. *Yet the fact is that the liability of the operators is in no way touched in the statute. Their obligations to the members of the crew therefore remain as they were without reference to it . . .*"

Very pertinent to the case at bar also is *Moss* v. *Alaska Packers Association*, 1945 A.M.C. 493, where, as here, the

plaintiff, while ashore on leave was injured, and brought suit for wages and maintenance and cure. The same objections were raised there as were raised in the instant case. Significantly enough, that case was decided before the *Hust* case but arrived at the same conclusion by the same process of reasoning. After holding the general agent liable as an operator, following the doctrine laid down in the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575, the Court then meets and rejects the argument that the Clarification Act wiped out the liability of the private operator and affirms the decision below as follows:

> "Appellant raises the point that Public Law 17 (Act of March 24, 1944, 76th Congress) makes only the United States suable. It is my opinion that this law does not exempt the private ship owner from suit. Public Law 17 provides that seamen shall have the same rights they always had. They are not to be classified as employees under federal compensation laws. The law also reads that claims for maintenance, cure, wages and damages shall be presented to the private ship owner and not to the United States of America. Thus, the law examined in its entirety leads me to conclude that the private ship owner and not the United States of America is to be considered as the employer."

In a like manner, the Court in *Gay* v. *Pope and Talbot, Inc.*, 1944 A.M.C. 855, also decided before the *Hust* decision, points out after a careful review of the legislative history and background holds the general agent liable as an operator and, with respect to the effect and purpose of the Clarification Act, held:

> "Public Law 17 was first offered in the House of Representatives as H. R. 7424 in 1942 and its purpose was declared in Senate Report No. 1813, 77th Congress, 2nd Session, to be: 'Inasmuch as seamen covered by Section 1 will be entitled to the rights provided under

the Jones Act and general maritime law and to the remedies under the Suits in Admiralty Act, they are expressly excluded from any benefits which would otherwise accrue as employees of the United States under the United States Employees' Compensation Act. This eliminates the danger that seamen might recover both against the Federal employees' compensation fund and under statutory or common-law remedies for the same injury.'"

It is thus clear that the Clarification Act was intended to fix the rights and liabilities only as between the seamen and the United States, and it was not intended to disturb the seamen's rights against anyone else.

Conclusion

The record before this Court compels the conclusion that the General Agent is the real operator in possession of the vessel, and that it exercised such a substantial degree of management and control over the vessel as to render it liable for all incidents flowing from the vessel's operations; and these responsibilities were not lessened in any degree by the nominal supervision of the United States arising out of considerations of security. This case is clearly controlled by the principles of the maritime law as outlined in the decision of this Court in the *Hust* case. The decision of the Court below is in clear conflict with the pronouncements of this Court, and should therefore be reversed.

Respectfully submitted,

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